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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALI HOLT THOMPSON, Defendant and Appellant.	A151625 (Contra Costa County Super. Ct. No. 051612092)

Ali Holt Thompson (defendant) appeals from a judgment entered after a jury found him guilty of assault with intent to commit rape, sodomy, or oral copulation (Pen. Code, § 220, subd. (a)(1);[1] count 1), sexual battery (§ 243.4, subd. (e)(1); count 2), and indecent exposure (§ 314, subd. (1); count 3) and the trial court placed him on five years of probation. He contends the court erred by: (1) prohibiting the defense from presenting certain evidence related to his mental state; and (2) denying his request for a mistrial. Additionally, defendant has filed supplemental briefing in which he contends the judgment must be conditionally reversed and the matter remanded to allow the trial court to determine whether he is eligible for mental health diversion under a recently enacted statute, section 1001.36. We affirm the judgment.

[1] All further, undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

An information was filed on July 25, 2016, charging defendant with assault with intent to commit rape, sodomy, or oral copulation (§ 220, subd. (a)(1); count 1), sexual battery (§ 243.4, subd. (e)(1); count 2), and indecent exposure (§ 314, subd. (1); count 3).

On the morning of June 11, 2015, the victim, who was referred to as Jane Doe below, drove to a carwash after dropping her children off at school. It was a very warm day and Doe was wearing a long dress. The carwash was "self-service," meaning "[y]ou drive your car in, . . . use coins and wash your car" with a spray hose "in your own little stall." Doe drove into a stall, put some coins in the carwash machine, and was about to start washing her car when a stranger, later identified as defendant, climbed over a metal bar that separated the carwash stall from the sidewalk and approached her.

Defendant told Doe that he wanted to tell her something and said, "Yeah, bitch, today is the day." Doe told defendant she did not know what he was talking about and asked him to leave. Defendant said, "No," "I want that ass, bitch, and I'm going to have it." Doe told him to leave her alone, but defendant exposed himself to Doe, told Doe to look at his penis, and said, "I know you want this."

Doe looked away, told defendant to go away, and moved to the other side of her car. Defendant "kept following [Doe] around" as she tried to get away from him. Doe became nervous and used the spray hose to spray water toward defendant. This prompted defendant to walk away momentarily, but he turned back around and said, "Ah, bitch, get ready," "I'm coming for that ass." He chased Doe, grabbed her dress from behind, and pulled it up all the way to her back "as if to take it off," exposing her underwear. Defendant also grabbed Doe's rear end, and Doe thought defendant was going to rape her.

Doe screamed and ran toward a man and a woman who were at the carwash and asked for help, but the man and woman did not help her.[2] Defendant grabbed Doe's arm

[2] The woman testified she was sitting in her car with her baby when she saw a man grab Doe's waist and lift her dress up. The woman held her baby and did not get out of the car because she was "very frightened."

and clothes and said he was going to have her and no one was going to do anything about it. Doe continued to scream, "Please, somebody help me. I'm not with him."

Two men arrived at the carwash and approached Doe and defendant. One of them said, "Hey, hey, leave her alone," and asked Doe, "Do you know this guy?" Doe said she did not know defendant and needed help. Defendant "buffed up" as if to ask, "What you gonna do?" Then the other man approached and asked defendant if he was causing problems. At that point, defendant fled, and a third man chased after defendant.

A bystander who was across the street from the carwash called 911 after he saw Doe scream in distress and saw her trying to get away from defendant, who appeared to be beating her. Police officers responded to the 911 call and drove Doe to a nearby location, where she identified defendant. Doe testified she has been afraid of being alone since the incident and avoids going anywhere if she is by herself and there are men around.

Grady Fort, a psychotherapist who worked at a youth center for patients with mental health diagnoses, testified he met defendant at the youth center in 2015, when he was assigned to be defendant's case worker. At the time, defendant was taking medication for his mental health diagnosis and was living at a residential treatment center. Defendant had been sober for about 90 days, received an award for good character, and "was doing well, [and] was very coherent, very thoughtful." He sometimes spoke incoherently or engaged in "ritualistic behavior" such as making crosses out of utensils and talking about conspiracy theories. He had some grandiose thoughts such as believing he was "the greatest rapper"; he also had auditory hallucinations.

Defendant eventually moved into his own apartment, and Fort visited defendant at the apartment on June 2, 2015, to "check in on him." There was broken glass, and blood on the refrigerator and on the sink. The oven "looked like the gas had been on and there was [*sic*] matches by it." Defendant "seem[ed] off" and appeared to be "pretty paranoid about [Fort's] presence . . . ." Fort "deemed it to be . . . an unsafe situation in terms of [defendant's] being a danger to himself" and called the police to conduct a welfare check.

Dr. Howard Friedman, whom the defense retained to evaluate defendant's mental health, testified as an expert in neuropsychology. Friedman interviewed defendant in August and September of 2016 and reviewed police reports and medical records. He also gave defendant three tests to determine his intellectual ability, emotional functioning, and potential for malingering.

Friedman testified that defendant's "full scale IQ is 74," which "puts him at 4th percentile" and means he is "mildly to moderately impaired." Defendant was also severely impaired in his ability to recall events. Defendant reported he had been hospitalized about a dozen times for schizophrenia. He had delusions and was sometimes unaware of what was going on around him. He occasionally believed he was Jesus and on rare occasions was still hearing some voices. Friedman did not believe defendant was malingering. Friedman diagnosed defendant with "schizophrenia, multiple episodes, currently in partial remission."

Friedman explained that a psychotic disorder like schizophrenia can affect an individual's decisionmaking and can take a long-term toll on the wiring of the brain. It can affect an individual's ability to think, store information, or utilize reasoning skills. When an individual is actively psychotic, he or she can carry out acts but cannot necessarily think logically about them.

Friedman reviewed a Concord police report from June 2, 2015, that stated defendant was detained on "a 5150" for "being mentally disordered" because he was "doing bizarre" things such as leaving the gas on in his apartment and lighting matches. Friedman also reviewed a July 2015 report by a Dr. James House in which House concluded that defendant was displaying schizophrenia symptoms such as being incoherent and having paranoid ideation and fragmented speech. Based on defendant's mental health history and the facts that defendant was engaged in bizarre behavior on June 2, 2015, and was actively psychotic in July 2015, Friedman opined that the "presumption of neuropsychology" was that defendant was psychotic at the time of the June 11, 2015 offenses.

During cross-examination, Friedman acknowledged he was aware that defendant had held a job for several years and was able to live on his own and carry out "usual activities" such as paying rent and utilities, going to the store, and eating. Friedman acknowledged that the fact that defendant was talking to a woman as opposed to an inanimate object such as a mailbox or a tree as he made sexual comments, and the fact that he fled when other men approached, can demonstrate that he is perceiving his surroundings and is "in reality."

The jury found defendant guilty as charged. The trial court placed defendant on probation for five years with various conditions and required him to register as a sex offender under section 290.

DISCUSSION

Background

In her opening statement, defense counsel presented a defense theory that defendant was not guilty of the offenses because his mental illness negated the requisite intent for each offense.[3] Counsel stated: "Nine days before this incident on June 2nd of 2015, Grady Fort will tell you that he called the police in hopes of having [defendant] 51/50'ed [*sic*] or put on a psychotic hold and admitted into a hospital because his conduct was so odd. They believed he was off of his medication. He believed he needed help. Unfortunately, he was not admitted into a hospital.

"Nine days later, after the caseworker tried to have [defendant] admitted to a hospital, Officer Lawrence, who you'll hear from, of the Concord Police Department had been to [defendant's] house. When Officer Lawrence went to [defendant's] house on the

[3] The mental state required for assault (count 1) is a specific intent to commit rape, sodomy, or oral copulation. (*People v. Dillon* (2009) 174 Cal.App.4th 1367, 1378.) The mental state required for sexual battery (count 2) is a specific intent that the touching be done for the purpose of sexual arousal, gratification, or abuse. (*In re Alberto S.* (1991) 226 Cal.App.3d 1459, 1463, fn. 2.) The mental state required for indecent exposure (count 3) is a specific intent to direct public attention to the genitals for the purpose of sexually arousing or gratifying oneself or sexually offending another person. (*People v. Massicot* (2002) 97 Cal.App.4th 920, 922.)

date of this incident, he realized he had been there earlier for a welfare check, and he saw that . . . the condition of [defendant's] house was horrific. [¶] It was very, very odd. There was a ceiling fan taken off of the ceiling and placed on the floor, and the different parts of the ceiling fan were taken apart. [¶] There was butter out, and it looked like there was butter that was written—like trying to write words with butter on the furniture. It was in complete disarray. [¶] Dr. Friedman, who you'll hear from, he's a neuropsychologist. You'll hear from him in the defense case. He relied on information like hearing how out of sorts [defendant's] apartment was, the conduct in this case."

After the People rested, the prosecutor objected to the defense's presenting Lawrence's testimony regarding the condition of defendant's apartment. The prosecutor said that Lawrence "has no personal knowledge to lay the proper foundation that the apartment to which he went belonged to the defendant." The trial court asked the prosecutor whether the evidence was relevant, and the prosecutor responded it was not. Defense counsel stated she could establish the apartment belonged to defendant. Counsel argued the evidence was relevant to show defendant's "mental state. He has blood and butter and all that." She argued the evidence was also "highly relevant" because when the defense expert evaluated defendant's mental state, he relied in part on the condition of defendant's apartment on the date of the offense.

The trial court stated it did not believe the evidence was relevant. Defense counsel responded, "It's the same date that he has blood on the walls, butter on the ground. It shows that he's mentally unstable, which is my complete defense. And I opened about it." Counsel stated the prosecutor should have moved to exclude the evidence before trial. The prosecutor responded that he did move to exclude all conduct that occurred before the incident as irrelevant and that the defense had not indicated it would introduce evidence of the condition of defendant's apartment. After further argument, the court excluded the evidence as irrelevant. Defense counsel requested a mistrial, which the court denied.

1. Evidentiary Ruling

Defendant contends the trial court erred in prohibiting him from presenting Lawrence's testimony about the condition of his apartment on the date of the offenses. He argues the court not only abused its discretion under the Evidence Code in excluding relevant evidence but also violated his constitutional rights under the Sixth and Fourteenth Amendments. We conclude the court should not have excluded the testimony but that the error did not implicate defendant's constitutional rights, and was harmless.

All relevant evidence is admissible. (Evid. Code, § 351.) Relevant evidence is "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Evidence of a defendant's mental illness is admissible to show whether he formed the specific intent underlying the charged conduct. (Pen. Code, § 28, subd. (a).) Further, an expert witness may testify about the facts underlying his or her conclusion if the fact "is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his [or her] testimony relates . . . ." (Evid. Code, § 801, subd. (b).)

Here, as noted, defense counsel represented to the trial court and to the jury in opening that Lawrence found defendant's apartment in disarray on June 11, 2015. The home was in "horrific" condition, and there were "very, very odd" things happening inside, including a ceiling fan that was taken apart and placed on the floor and butter smeared onto the furniture as if someone had tried to use the butter to write words on the furniture. Counsel also informed the court that Friedman relied on "information like hearing how out of sorts [defendant's] apartment was" in reaching his conclusions about defendant's mental state. Lawrence's testimony about the condition of defendant's apartment on the date of the offenses was admissible because it was relevant to the issue of defendant's mental state and because Friedman relied on it in reaching his conclusions.

The People argue the trial court "properly found the proffered evidence was irrelevant because a disordered residence is not a definitive symptom of mental illness." The People also argue that while Friedman may have relied on Lawrence's observations in assessing defendant, "there is no indication that the fact was a necessary or significant

component of his evaluation or that it was an actual symptom of mental illness." There is, however, no requirement that evidence be "definitive" or "significant" for it to be admissible. Rather, " '[t]he test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' " (*People v. Bivert* (2011) 52 Cal.4th 96, 116–117.) "The evidence need not be dispositive of the disputed fact," and a claim that the evidence is weak "goes to the weight, not the admissibility, of the evidence." (*People v. Richardson* (2008) 43 Cal.4th 959, 1002, 1003.) We conclude that while the fact that defendant's apartment was in "horrific" or "very, very odd" condition on the date of the offenses may not be "definitive" or "significant" in showing defendant's mental state, it was relevant to the issue and was not inadmissible on relevance grounds.

We conclude, however, that defendant's constitutional rights were not implicated. Defendant argues "the error took on a constitutional dimension" because the exclusion of the testimony "circumvented his right to present a complete defense," prevented defense counsel from presenting testimony she had promised the jury in opening, and "impacted the jury's view of Dr. Friedman's credibility . . . ." "[T]he routine application of provisions of the state Evidence Code law," however, "does not implicate a defendant's constitutional rights." (*People v. Jones* (2013) 57 Cal.4th 899, 957.) Where a trial court "merely reject[s] some evidence concerning a defense and [does] not preclude defendant from presenting a defense, any error is one of state law . . . ." (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.)

The record shows defendant was not precluded from presenting a defense. Rather, he presented the testimony of Fort, who testified that defendant had a mental health diagnosis in 2015 and was evaluated just nine days before the incident for being "off" and "paranoid" and having multiple things of concern in his apartment, including broken glass, blood on the refrigerator and sink, and an oven that appeared to be on, with matches nearby. The defense also presented the testimony of Friedman, who provided detailed testimony regarding the various tests and interviews he conducted, the reports he reviewed regarding defendant's mental health history shortly before and after the

incident, and the effect schizophrenia may have on an individual's ability to perceive reality. The jury therefore heard ample evidence from which it could evaluate the defense theory, including making credibility determinations and determining defendant's mental state.

We further conclude the error in excluding the evidence as irrelevant was harmless. Because "the routine application of provisions of the state Evidence Code law does not implicate a defendant's constitutional rights" (*People v. Jones*, *supra*, 57 Cal.4th at p. 957), "any error is one of state law and is properly reviewed under *People v. Watson* [(1956)] 46 Cal.2d [818,] 836" (*People v. McNeal*, *supra*, 46 Cal.4th at p. 1203). Having examined all the evidence, we conclude it is not reasonably probable defendant would have achieved a more favorable result if Lawrence had been permitted to testify.

The question for the jury was whether defendant lacked the specific intent to commit the offenses. As noted, the jury heard detailed testimony from Fort and Friedman regarding defendant's psychotic state and about the effect schizophrenia may have in negating intent. In light of Fort's testimony regarding defendant's mental state and the condition of his apartment on June 2, 2015, Lawrence's proffered testimony that the apartment was also in disarray nine days later was not likely to have much impact on the jury. In addition, because Friedman relied on many factors—including interviews, tests, and reports—in reaching his expert opinion about defendant's mental state, Lawrence's testimony was not likely to bolster Friedman's conclusion or credibility. In light of other, significant evidence of defendant's mental state on the date of the offenses, we do not believe the jury would have been swayed had it heard additional evidence about the condition of defendant's apartment.

Defendant argues he was prejudiced because the trial court's ruling "occurred midway through trial, thereby forcing the defense into the unenviable position of not being able to present evidence it had promised the jury in its opening statement." Defense counsel's reference to Lawrence's testimony, however, was brief, and the prosecutor did not comment on her failure to present any evidence or argue to the jury that it should infer anything from that omission. Moreover, the court instructed the jury

that "[n]othing that the attorneys say" throughout the trial, including during "their opening statements," "is evidence." The court also instructed the jury that neither side is required to call all witnesses who may have information about the case. In light of the brief reference to Lawrence's testimony, the instructions, and the fact that the testimony was not critical to the defense, we believe it is unlikely the jury was influenced by the lack of Lawrence's testimony in a way that prejudiced defendant.

Defendant also argues that Lawrence's testimony would have made a difference because this was a close case. Defendant points out that the jury took a full day to deliberate and submitted questions, including one concerning mental intent. The length of deliberations or questions or requests for read-backs from the jury, however, do not compel the conclusion that the case was close. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 691.) Here, there was strong evidence that defendant had the specific intent to commit the crimes of which he was convicted. His conduct and words exhibited a purposefulness and intent to pursue Doe for his own sexual gratification. He approached a woman who was alone at a carwash, and he was explicit in telling her he wanted her for a sexual purpose. He exposed himself to her, grabbed her body and dress, and continued to pursue her as she screamed for help and tried to get away.

Further, while there was evidence of mental illness, there was also evidence that defendant had held a job for years, was able to live on his own, and could carry out some "usual activities" such as paying rent and going to the store and eating. He had also directed his sexual comments and acts to Doe, a woman, as opposed to an inanimate object such as a tree, and fled when the third man approached, which indicated he was perceiving his surroundings and was "in reality." From all of the evidence before it, the jury was left with the overwhelming conclusion that defendant knew what he was doing in accosting and assaulting Doe to satisfy his sexual desires and that his conduct was not excused by mental illness.

2. Mistrial

Defendant contends the trial court erred in denying his request for a mistrial. We reject this contention.

A mistrial should be granted where " ' " 'the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. . . .' [Citation.]" ' " (*People v. Harris* (2013) 57 Cal.4th 804, 848.) "[A] motion for mistrial should be granted only when ' "a party's chances of receiving a fair trial have been irreparably damaged." ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) A trial court's ruling on a motion for mistrial is reviewed for an abuse of discretion. (*Ibid.*)

Here, the trial court's exclusion of Lawrence's testimony did not cause irreparable damage to defendant's prospects of having a fair trial. Defendant asserts a mistrial was warranted not "merely because the excluded evidence was actually relevant, but [also] because defense counsel had previously promised the admission of Officer Lawrence's testimony during her opening statements." In light of our conclusion above that the evidentiary error did not implicate defendant's constitutional rights, and that there was no prejudice resulting from the timing of the court's ruling or the exclusion of Lawrence's testimony, we also reject defendant's contention that the court should have granted his request for a mistrial.

3. Mental Health Diversion

In his supplemental brief, defendant contends the judgment must be conditionally reversed and the matter remanded to allow the trial court to determine whether he is eligible for mental health diversion under section 1001.36. We reject his contention.

Section 1001.36 was enacted while this appeal was pending and became effective on June 27, 2018. (Stats. 2018, ch. 34, §§ 24, 37, No. 2 Deering's Adv. Legis. Service, pp. 230, 250–252, 269.) Under this statute, a trial court has discretion to grant "pretrial diversion" to a defendant who suffers from a mental disorder and meets the criteria specified in the statute. (§ 1001.36, subd. (b).) If the court grants diversion, it may postpone criminal proceedings for up to two years to allow the defendant to undergo mental health treatment. (§ 1001.36, subds. (a), (c).) If the defendant performs satisfactorily in diversion, the court "shall dismiss the defendant's criminal charges that

were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

Shortly after the enactment of section 1001.36, the Legislature amended the statute, effective January 1, 2019, to preclude relief to certain individuals, including those like defendant who are charged with crimes that require sex offender registration. (§ 1001.36, as amended by Stats. 2018, ch. 1005, § 1; see § 290, subd. (c) [list of crimes that require sex offender registration, including section 220].) Defendant acknowledges this amendment (the January 1, 2019 amendment) eliminated his eligibility for diversion but argues he is nevertheless entitled to relief.

First, defendant argues he is entitled to relief under section 1001.36 as originally enacted because ameliorative amendments to criminal statutes generally apply retroactively, absent a contrary expression of legislative intent. (Citing *In re Estrada* (1965) 63 Cal.2d 740, 744–745.) He notes there is a split in authority as to whether section 1001.36 applies retroactively, points out that the issue is currently before the Supreme Court, and urges us to follow cases holding the statute applies retroactively. (Citing *People v. Frahs* (2018) 27 Cal.App.5th 784, 791 [retroactive], review granted Dec. 27, 2018, S252220; *People v. Craine* (2019) 35 Cal.App.5th 744, 760 [not retroactive].)

Second, defendant argues the January 1, 2019 amendment that eliminated his eligibility for diversion does *not* apply retroactively because unlike section 1001.36 as originally enacted, which provided defendants with an ameliorative *benefit*, the January 1, 2019 amendment *took away* the benefit. He argues that the "removal of [an] ameliorative benefit may only be enforced prospectively" under the ex post facto clauses of the state and federal Constitutions.

We need not, and therefore will not, decide whether section 1001.36 as originally enacted applies retroactively because even assuming it does, we conclude that application of the January 1, 2019 amendment does not violate ex post facto prohibitions and that defendant is therefore statutorily ineligible for mental health diversion.

The Court of Appeal in *People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1053 (*Cawkwell*) recently addressed the same argument defendant raises here, i.e., that application of the January 1, 2019 amendment violates the ex post facto clauses of the state and federal Constitutions. In *Cawkwell*, the defendant was found guilty of sex crimes that required him to register as a sex offender. (*Id.* at p. 1051.) The defendant argued on appeal that "the ameliorative provisions of the mental health diversion statutes apply retroactively to his case, while the subsequent amendment eliminating eligibility for sex offenders (like him) cannot apply retroactively due to ex post facto considerations." (*Id*. at p. 1053.) The Court of Appeal rejected the latter contention and therefore did not reach the issue of whether the statutes "otherwise apply retroactively." (*Ibid*.)

The Court of Appeal explained that a statute violates the prohibition against ex post facto laws " 'if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it is committed.' (*People v. White* (2017) 2 Cal.5th 349, 360 [citation].)" (*Cawkwell*, *supra*, 34 Cal.App.5th at p. 1054.) "The ex post facto prohibition ensures that people are given 'fair warning' of the punishment to which they may be subjected if they violate the law; they can rely on the meaning of the statute until it is explicitly changed." (*Ibid.*) The Court of Appeal went on to state that "[w]hen Cawkwell [committed his crimes] between November 2015 and April 2016, the possibility of pretrial mental health diversion did not exist. The initial version of section 1001.36 was not enacted until more than two years later, in June 2018. Consequently, Cawkwell could not have relied on the possibility of receiving pretrial mental health diversion when he [committed his crimes]." (*Ibid.*)

The Court of Appeal also held the January 1, 2019 amendment "did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for the offenses with which Cawkwell was charged." (*Cawkwell*, *supra*, 34 Cal.App.5th at p. 1054, citing *People v. White*, *supra*, 2 Cal.5th at p. 360.) "That is, Cawkwell was subject to the same punishment when he committed his offenses as he was after the Legislature narrowed the scope of defendants eligible for diversion. Thus, the

amendment does not violate the ex post facto clauses of the state or federal Constitutions, and Cawkwell is ineligible for mental health diversion." (*Ibid.*)

Similarly, here, defendant committed his crimes over two years before the Legislature enacted section 1001.36. Because all relevant legislative activity occurred years after defendant committed his offenses, he could not have relied on the possibility of receiving mental health diversion when he committed his crimes. We agree with the analysis set forth in *Cawkwell* that application of the January 1, 2019 amendment does not violate ex post facto considerations. Accordingly, defendant is statutorily ineligible for mental health diversion because of the crimes with which he was charged, and a conditional reversal and/or remand is improper.

DISPOSITION

The judgment is affirmed.

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Wiseman, J.*

WE CONCUR:

_____
Siggins, P. J.

_____
Petrou, J.

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.